IN THE UNITED STATES BANKRUPTCY COURT

FOR THE DISTRICT OF IDAHO

IN RE	)	
DENNIS I. GOLDBERG,	)	**Case No. 97-20673-7**
Debtor.	)	**MEMORANDUM OF DECISION AND ORDER**
DENNIS I. GOLDBERG,	)	**Adv. No. 98-6222**
Plaintiff,	)	
vs.	)	
PAUL W. DAUGHARTY,	)	
Defendant.	)	

HONORABLE TERRY L. MYERS, UNITED STATES BANKRUPTCY JUDGE

Louis Garbrecht, Coeur d'Alene, Idaho, for Plaintiff.

Theodore L. Rupp, Coeur d'Alene, Idaho, for Defendant.

Background

The Plaintiff's amended complaint seeks to avoid or rescind, in whole or part, a consensual deed of trust in favor of the Defendant on the theory that it is in violation of the Truth in Lending Act ("TILA"),[1] impairs his homestead, was unconscionable, and/or secured less than the amount alleged to be due.

The Plaintiff moves for partial summary judgment under the first count of the amended complaint which alleges the deed of trust was taken in violation of TILA. Determination of the motion hinges upon the application of TILA to this transaction and, in particular, upon whether Defendant is a "creditor" required to make TILA disclosures to Plaintiff.[2]

Discussion

1. Summary judgment

Summary judgment is appropriate under Fed.R.Civ.P. 56, incorporated in this case by Rule 7056, "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact that the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c). *See also, Elsaesser v. Gale (In re Lake City R.V., Inc.),* 99.2 I.B.C.R. 51, 52 (Bankr. D. Idaho 1999) citing *Margolis v. Ryan*, 140 F.3d 850, 852 (9th Cir. 1998).

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[1] 15 U.S.C. §§ 1601 through 1693. The Plaintiff contends that, if TILA applies, the absence in the deed of trust of the requisite three-day "cooling off" notice, 15 U.S.C. § 1635(a), allows the Plaintiff three years from the execution of the deed of trust within which to rescind. 15 U.S.C. § 1635(f). Further, Plaintiff alleges that Defendant has failed to provide an itemized accounting of all charges incurred, a written fee agreement, or make other disclosures required by TILA.

[2] At the hearing on this motion, the parties also argued over limitations on the remedy of recission under TILA. This question will only be reached if TILA is found applicable.

> [A] party seeking summary judgment always bears the initial responsibility of informing the . . . court of the basis for its motion, and identifying those portions of 'the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any,' which it believes demonstrate the absence of a genuine issue of material fact.

Celotex Corporation v. Catrett, 477 U.S. 317, 323 (1986).

Once the moving party meets its "initial burden to show the absence of a material and triable issue of fact; the burden then moves to the opposing party, who must present significant probative evidence tending to support its claim or defense." *Aubrey v. Thomas (In re Aubrey)*, 111 B.R. 268, 272 (9th Cir. BAP 1990) (quoting *Richards v. Neilsen Freight Lines*, 810 F.2d 898, 902 (9th Cir. 1987)). In ruling on a motion for summary judgment, the court must view the facts in the light most favorable to the nonmoving party. *See*, *Margolis*, 140 F.3d at 852.

2. Truth in Lending Act.

Congress enacted TILA to achieve "the informed use of credit," which "results from an awareness of the costs thereof by consumers." 15 U.S.C. § 1601. TILA requires disclosure of credit terms to consumers so that potential borrowers will be able to compare the available costs of credit. *Id. See also, Dixey v. Idaho First National Bank*, 677 F.2d 749, 751 (9th Cir. 1982) citing *Anderson Bros. Ford v. Valencia*, 425 U.S. 205, 219-20, 101 S.Ct. 2266, 2274, 68 L.Ed.2d 783 (1981); *Mourning v. Family Publications Service, Inc.,* 411 U.S. 356, 363-66, 93 S.Ct. 1652, 1657-59, 36 L.Ed.2d 318 (1973). To effectuate this purpose, TILA should be liberally construed to protect borrowers. *Ramsey v. Vista Mortgage Group (Ramsey),* 176 B.R. 183, 187 (9th Cir. BAP 1994) citing *Eby v. Reb Realty, Inc.,* 495 F.2d 646, 650 (9th Cir. 1974). *See also*, *Jackson v. Grant*, 890 F.2d 118, 120 (9th Cir. 1989).

TILA's provisions are implemented, in part, through regulations. *Thorp Loan and Thrift Co., v. Buckles (In Re Buckles)*, 189 B.R. 752, 759 (Bankr. D. Minn. 1995). These are found at 12 CFR, Part 226, and are commonly known as "Regulation Z." *Ford Motor Credit Co. v. Milhollin*, 444 U.S. 555, 100 S.Ct. 790, 63 L.Ed.2d 22 (1980), instructs that the courts must grant great deference to Regulation Z, and its "Official Staff Commentary." *Buckles*, at 759. Thus, in analyzing any issue under TILA, the Court must take into account not only the language of the statute, but also how that language has been interpreted in Regulation Z and the Official Commentary. *Id.*; *Ford*, 444 U.S. at 565, 100 S.Ct. at 796.

a. Is the Defendant subject to TILA?

Only certain "creditors" are required to make disclosures to consumers under TILA. Section 1602(f) defines such a "creditor" as:

> [A] person who both (1) regularly extends, whether in connection with loans, sales of property or services, or otherwise, consumer credit which is payable by agreement in more than four installments or for which the payment of a finance charge is or may be required, and (2) is the person to whom the debt arising from the consumer credit transaction is initially payable on the face of the evidence of indebtedness or, if there is no such evidence of indebtedness, by agreement.

Regulation Z further defines a "creditor" as:

> A person (A) who regularly extends consumer credit that is subject to a finance charge or is payable by written agreement in more than 4 installments (not including a downpayment), and (B) to whom the obligation is initially payable, either on the face of the note or contract, or by agreement when there is no note or contract.

12 C.F.R. § 226.2(a)(17)(i). Finally, the footnote to this regulation elaborates that:

> A person regularly extends consumer credit only if it extended credit (other than credit subject to the requirements of § 226.32) more than 25 times (or more than 5 times for transactions secured by a dwelling) in the preceding calendar year. If a person did not meet these numerical standards in the preceding calendar year, the numerical standards shall be applied to the current calendar year.

§ 226.2(a)(17)(i), fn.3.

In addition to the requirement that the creditor "regularly" extend consumer credit, that credit must be subject to a "finance charge." A finance charge is defined as:

> (a) Definition. The finance charge is the cost of consumer credit as a dollar amount. It includes any charge payable directly or indirectly by the consumer and imposed directly or indirectly by the creditor as an incident to or a condition of the extension of credit. It does not include any charge of a type payable in a comparable cash transaction.

§ 226.4(a). Certain charges do not fall within this definition. Section 226.4(c)(2) provides:

> (c) Charges excluded from the finance charge. The following charges are not finance charges:
> . . .
> (2) Charges for actual unanticipated late payment, for exceeding a credit limit, or for delinquency, default, or a similar occurrence.

The Official Staff Interpretation to § 226.4 sets forth standards to determine whether a charge is a late payment or finance charge:

> 1. Late payment charges. . . . In determining whether a charge is for actual unanticipated late payment on a thirty day account, for example, factors to be considered include:
>
> . The terms of the account. For example, is the consumer required by the account terms to pay the account balance in full each month? If not, the charge may be a finance charge.
>
> . The practices of the creditor in handling the accounts. For example, regardless of the terms of the account, does the creditor allow consumers to pay the accounts over a period of time without demanding payment in full or taking other action to collect? If no effort is made to collect the full amount due, the charge may be a finance charge.

12 CFR Pt. 226.4, Supp. I.

The Plaintiff argues that the Defendant is a "creditor" subject to TILA because he regularly extends credit to his clients. The Plaintiff supports this argument through an affidavit of Marlene Sproul, the Plaintiff's bookkeeper. Ms. Sproul asserts that upon reviewing the Defendant's billing records she determined that 128 of 209 accounts over the 1997 calendar year had some interest accrual.

Ms. Sproul has no personal knowledge of the Defendant's business practices. Her affidavit establishes only that a mechanical review of accounting documents obtained in discovery show a certain percentage of the Defendant's clients have had the 1.5% charge applied to their bills for some period of time.

The Defendant's affidavit disputes that he extends credit by agreement to his clients. Rather, he claims that his agreement with his clients, evidenced by information he provides them and the billing statements they receive, calls for payment in full monthly, and that those clients who do not pay the entire balance when due are charged a late payment fee on the portion which goes unpaid.

The Court's research[3] has unearthed only one decision mirroring the present dispute. *Porter v. Hill*, 838 P.2d 45 (Or. 1992), considered whether a one and one-half percent charge added by an attorney to balances due from clients on amounts more than thirty days past due was a "late payment fee" and not a "finance charge" to which TILA disclosure requirements applied. The court held:

> Plaintiff's billing statements, which were incorporated by reference in the pleadings, and his original complaint refer to a "late payment charge," not to a finance charge. Although defendant's counterclaim alleges that plaintiff added a "finance charge" and although we assume the truth of all well-pleaded allegations, the characterization of the amount as a "finance charge" is a legal conclusion, not a fact. The parties' written agreement required defendant to pay the balance in full "in advance, or upon billing by Attorney." Defendant does not allege that the parties amended that agreement. Defendant does not allege that plaintiff in fact ever gave him the option of paying over time subject to the 1 ½ percent charge; . . . indeed, instead of doing that, plaintiff demanded full payment each month and, when he was dissatisfied, brought this action to collect the full amount due. The debtor's mere failure to pay the account in full when due does not convert the charge into a finance charge. *See Bright v. Ball Memorial Hospital Ass'n, Inc.,* supra, 616 F.2d at 334-37 (where agreement provided for late payment charge on unpaid balance, failure of customer to pay bill when due was "unanticipated," and late payment charge was not a finance charge); *Rogers Mortuary, Inc. v. White*, 92 N.M. 691, 594 P.2d 351, 353 (1979) (debtor's failure to pay in full, and debtor's attempt to interpret a funeral purchase agreement as allowing an extension of credit, did not make the late payment charge provided for in the agreement a finance charge).

838 P.2d at 51-52 (footnote omitted.)

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[3] The Court has considered the authorities cited by counsel, as well as numerous other cases, and materials bearing on the question such as James Lockhart, J.D., Annotation, *Who is a "Creditor" Within Meaning of § 103(f) of Truth in Lending Act (15 U.S.C.A. § 1602(f))*, 157 A.L.R.Fed. 419 (1999).

There is no evidence submitted by the Plaintiff that the Defendant's fee agreements contemplated the deferral of payment in such a way that the Defendant was agreeing to extend credit in return for a "finance charge." Exhibit C, the "client intake sheet" attached to the Defendant's affidavit, explains that each regular monthly bill is to be paid in full no later than the 20th day of the month in which it is received and that any overdue balance would be charged interest after one month. The form of billing statement provided as Exhibit B is consistent. This would indicate that the Defendant was assessing a "late payment charge" rather than a "finance charge."

Clearly, a large number of the Defendant's clients were paying 1.5 % interest on their outstanding account balances, and paying those obligations over time. This at least creates the perception that the Defendant regularly tolerated installment payments rather than insisted on full payment. The Plaintiff might have some reason to think the Defendant's practices amounted to a de facto agreement to extend credit to clients subject to a finance charge.

But at this stage, the burden is on the Plaintiff to establish the absence of a genuine issue of material fact and his entitlement to summary judgment. All inferences from the evidence submitted must be construed most favorably to the Defendant as the nonmoving party. The Court therefore finds that there is an insufficient basis to conclude, for purposes of Rule 7056, that the Defendant is a creditor who "regularly extends credit by agreement" and imposes a finance charge not a late payment fee. Accordingly, Plaintiff's motion must be denied.

ORDER

Based upon the foregoing, the Plaintiff's motion for partial summary judgment is DENIED.

Dated this 25th of January, 2000.